No. 14,983

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE B. RUSSELL,

Appellant,

—vs—

THE TEXAS COMPANY, a corporation,
FREDERICK T. MANNING DRILLING COMPANY,
a corporation, and
THE NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellees.

THE TEXAS COMPANY, a corporation,

Cross-Appellant,

—vs—

THEODORE B. RUSSELL,

Cross-Appellee.

BRIEF OF APPELLEE AND CROSS-APPELLANT, THE TEXAS COMPANY

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BRIEF OF APPELLEE AND CROSS-APPELLANT, THE TEXAS COMPANY

There are two basic questions involved in this appeal—first, the question of the ownership of the minerals in the land, and the right of entry upon the surface for the purpose of mining the minerals; and secondly, the question of the damages to which the appellant Russell is entitled from The Texas Company arising out of such mining.

In this brief we make no mention of the contention of appellant Russell as to the ownership of minerals in Section 23, or

of the basic right of the defendants to enter upon the section for the purpose of mining the oil, for the reason that such question is fully considered in a separate brief of the appellee Northern Pacific Railway Company, which is filed herein. This brief shall be devoted to the question of the damages to which the appellant Russell is entitled arising out of such mining.

SUMMARY OF EVIDENCE

Defendant Railway Company entered into a contract for deed November 30, 1909, recorded June 2, 1917, containing a mineral exception and reservation *(Tr. pp. 57-58, and Exhibit)*. On June 14, 1918, pursuant to the contract, defendant Railway Company conveyed the land to one Millard Stubrud, the deed being recorded June 26, 1918, which contained this mineral exception and reservation in part. After reserving all minerals, the deed provided:

> "* * * together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; * * *" *(Tr. pp. 59-60)*.

Russell acquired the land in 1944 by a special warranty deed from Blossom *(Stipulation, Tr. p. 58, and Exhibit)*. Since 1944, Russell has at all times leased the surface to one Bert Ekland who has used it for grazing *(Tr. p. 223)*. The annual rentals received by Russell were cash in the sum of $75 for each year from 1948 through 1951, and $100 for 1952 and 1953, and Ekland kept the fences in repair *(Tr. pp. 65-66)*.

Defendants Exhibits 11 through 26 give a good representation of the S½ of the section of land involved, and the surface

topography, and the general surface condition *(Tr. pp. 214-215)*. The N½ not shown is badland. *(T, 224)*. Lillis classified the section as "a grazing section not suitable for farming", and that it is typical open range country *(Tr. pp. 187-188)*. An attempt was made to farm between 70 and 80 acres of the section on each of two years prior to 1920 *(Tr. p. 223)*. Except for that attempt at farming, the land has been continuously used for grazing purposes since 1916, and has been dry land, rough land, suitable only for pasturage, and used only for grazing. It was in general rough, waterless, unirrigated, uncultivated, open range, grazing land. *(Tr. pp. 187-188; Tr. pp. 222-225)*. Defendant The Texas Company constructed a dam, or reservoir, which increased the usability of the section for grazing purposes, and increased the value of the section for grazing purposes. *(Tr. pp. 192-193; Tr. p. 225)*. Except for the reservoir, there was no water, surface water, or other water capable of being used for drilling purposes *(Tr. p. 178)*; there was one small spring which gave a small trickle in the southwest corner of the section, but no other water sources except flowing surface water following a rain *(Tr. pp. 191-192; Tr. pp. 224-225)*.

Ekland, who owned, lived upon, and ranched adjacent sections, since 1916, and had used section 23 involved practically from 1916 to the date of the trial, and who had leased the section from Russell from 1944 to the date of the trial, expressed his opinion that the surface of the land was worth $7 to $8 per acre *(Tr. p. 227)*. Lillis had spent a portion of one day only on the property on April 14, 1955 *(Tr. p. 176)*. He was not familiar with the market value of the land in 1952, nor with any grazing lands in Dawson County, made no inquiries of any kind in Dawson County with real estate men, nor local stockmen, nor with anybody familiar with the land to ascertain its market

value *(Tr. pp. 190-191.* He expressed his opinion that the value of the land at the time of trial from the standpoint of useful grazing for stock purposes was $10 to $15 per acre *(Tr. p. 189).*

The extent to which the defendants used the surface of the land, both rightfully and wrongfully, is undisputed. Defendants commenced their mining operations on Section 23 on March 14, 1952 *(Q. 1, and answer thereto, Pl. Ex. 8-9).*

Actual survey by the witness Traver disclosed the use of a total area on Section 23 of 948,414 sq. ft., or 21.76 acres *(Tr. pp. 209-216, Pl. Ex. 3, Ex. A; Def. Ex. 27).* Lillis testified he roughly checked the figures and they were substantially correct *(Tr. p. 177),* but he added some additional acreage which he thought had not been included, and his estimate of the total acreage used was 24½ acres *(Tr. pp. 177-178.*

The only portion of the entire area wrongfully used as an access to adjacent sections is marked out in parentheses on roads 1 and 16 in defendants Exhibit 27 *(Tr. pp. 214, 216).* Road 16 was commenced on October 6, 1952, *(Q. 3, Ans. 3, Pl. Ex. 8-9),* and its wrongful use terminated on November 22, 1952 *(Q. 4, Ans. 4, Pl. Ex. 8-9).* The entire area wrongfully used was 68,125 sq. ft. or, since there are 43,560 sq. ft. in one acre, a total of 1.5 acres *(Def. Ex. 27 as corrected, Pl. Ex. 3, Ex. A).* In connection with road 1, defendants wrongfully used .303 acres between September 3 and November 22, 1952 *(Q. 2, Ans. 2, Pl. Ex. 8-9; Q. 4, Ans. 4, Pl. Ex. 8-9; Def. Ex. 27, as corrected; Tr. pp. 208-220).* In other words, defendants wrongfully used roads as an access to other lands totalling 1.863 acres for a total period of time of about two months.

Defendants objected to the testimony of Lillis with respect to the value of use of roads, and the initial objection is set out at page 180 of the transcript. Lillis was then permitted to testify

over objection, with the court reserving its ruling *(Tr. p. 182)*. His lack of familiarity with these lands, and roads in particular, is disclosed by his testimony on cross-examination between pages 192 and 197 of the transcript.

In addition to the surface area wrongfully used as an access, those portions of roads 1 and 16 referred to above, defendants took 50 cu. yds. of native rock which was used on adjacent Section 22. It was taken from that surface area which they had rightfully taken and used under their right of entry, and for which surface area the defendants owed the market value at the time mining operations commenced. *(Q. 2, Ans. 2, Pl. Ex. 1 and 3, Def. Ex. 27, and Pl. Ex. 3, Ex. A)*. Lillis over objection that he had not adequately qualified, judged the market value of the rock in place at 50¢ per cubic yard *(Tr. pp. 220-221)*.

Defendants constructed a dam or reservoir on the land which as indicated above enhanced the value of the land for grazing. Between September 14 and November 12, 1952, defendants used that dam to pump 15,000 barrels of water to adjacent Section 22 *(Q. 2, Ans. 2, Pl. Ex. 1 and 3)*. Defendants deny that plaintiff owned that water, but even if he did, there is no evidence of the market value of the water at the dam. Lillis and others testified over objection to the cost of transporting water from various sources outside the section, with their delivery at a drill site. Lillis said 15¢ to 20¢ a barrel *(Tr. pp. 185-186)*; Russell said 30¢ per barrel *(Tr. pp. 204-206;* Morton testified 25¢ per barrel *(Tr. pp. 199-201)*.

Plaintiff's Exhibit 10 was offered, objected to, and the court reserved a ruling on the exhibit *(Tr. pp. 197-198)*. Morton using that as a foundation for his testimony, was asked his opinion concerning the reasonable and fair market value of the 24½ acres of land on this particular lease "for the purpose of drilling

for oil, bearing in mind that it is only the surface which the plaintiff owns" *(Tr. p. 202)*. Over objection, the witness then testified that conservatively speaking it was his honest opinion the value of the surface rights only insofar as the 24½ acres were concerned would be somewhere between $10,000 and $20,000 *(Tr. pp. 202-203)*. The sole foundation for the man's testimony was that he had been in the oil business leasing and drilling for 30 years, and was familiar with the cost of producing leases, and the cost of lands for drilling for oil. He had never been on the land, knew nothing about the lease, other than plaintiff's Exhibit 10. Objections to his testimony are set out in the transcript at pages 199-200, and 202.

Russell claims a contract with the defendants Texas Company and Manning Drilling Company by reason of letter *(Pl. Exh. 4, 5, 6, and 7; Def. Exh. 32 and 33)*. Los Angeles attorneys purportedly acting on behalf of Russell wrote a letter dated October 28, 1952, and copy of which was addressed to and was received by The Texas Company, in which they described the use of roadways on Section 23 for operations on adjacent lands, and use of water and materials, as a wilful trespass and conversion and that "compensation for such trespass at the rate of $150 per day is hereby demanded by return remittance." The letter then stated:

> "Mr. Russell is willing to permit you a revocable license to continue the use of the extent that the same has existed over the past period upon your payment to him of the sum of $150 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadway, water and/or material will constitute your acceptance of this revocable permit. Your remittance should be made to Mr. Theodore B. Russell * * *". *(Tr. pp. 78-80)*

Defendants used the access roads until they constructed a

road around the section, and then ceased such use on November 22, 1952.

In other words, after October 28, 1952, defendants used no rock; pumped water, title to which is in dispute, from a surface area for which they owed the market value, until November 12, 1952; and used the 1.863 acres of roads until November 22. All other use of the land was a proper and authorized use.

Russell attempted to prove that the reasonable value of the use of those roads was $2.00 per day *(Tr. p. 182)* for which he claims a total of $110.00 for 55 days' use prior to October 28, 1952 *(Appellant's brief page 41)*. Yet he claims on the strength of the foregoing $3600 for 24 days' use after October 28, or at the rate of $150 per day.

Under date December 16, 1952, postmarked December 26, 1952, defendant The Texas Company responded with a letter advising that it had used such an access road for a very short distance, had used some materials in building part of a road on Section 22, had used some water for the adjacent sections, that it should reimburse Mr. Russell for any actual damage he may have suffered from such unauthorized use, and stated:

> "What that damage amounted to, it is difficult to say, but certainly it is not great. The land is open, rolling, grazing land, and probably not worth over $5.00 an acre for grazing purposes. The suggested compensation of $150.00 a day for the time that this road may have been used in operations upon adjoining lands is so far beyond the actual detriment to Mr. Russell, that it will not be considered." *(Tr. pp. 81-83; Def. Exh. 32; Tr. p. 90, Def. Exh. 33).*

STATEMENT OF THE CASE

a. First Issue:

As appears from the pleadings in this case, the Railway Company received a patent to this section from the United States,

and in its conveyances to the predecessor in interest of the appellant Russell, the Railway Company as vendor reserved unto itself and to its successors and assigns forever:

> "all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon.'

Thereafter the Railway Company entered into a written oil and gas lease with the appellee and cross-appellant, The Texas Company. Acting under the authority of that oil and gas lease in writing, The Texas Company entered upon Section 23, drilled oil wells thereon, and in connection with such operation built roads on the premises surfaced with scoria or rock taken from the premises, used those roads, constructed a reservoir and appropriated water therein, used the water from the reservoir and its drilling operations, and extracted and carried away oil from the premises.

If the Railway Company was the owner of the minerals in the land, and the owner of the right to use the surface for mining purposes, as found by the trial court, The Texas Company was not a trespasser upon Section 23 when it entered and mined the Section for the purposes of producing oil. The Texas Company was required, however, under the reservation above quoted, as lessee of the Railway Company, to pay to the appellant Russell as the owner of all surface rights other than the use of the surface for mining purposes, the market value at the time mining operations were commenced of such portion

of the surface as was used in such mining operations, including any improvements thereon.

The trial court found that The Texas Company commenced mining operations March 14, 1952; used a total of 23.76 acres in its mining operations; that the surface of the section was rough, dry, unirrigated, uncultivated land suitable only for grazing purposes, and except for the mining operations by The Texas Company had been used solely since 1920 for grazing purposes; that the most valuable use available to the appellant Russell for Section 23 as of the date mining operations commenced on March 14, 1952, was the use for grazing purposes; that the market value of the use to the appellant Russell on March 14, 1952, was $10 per acre, and the rental value was $100 per year *(Tr. p. 114, Findings of Fact VIII, IX, X, and XI)*. The court awarded to appellant Russell the sum of $237.60 for the reasonable market value as of the date mining operations commenced of that portion of the surface taken for mining purposes.

Accordingly, the first issue on this appeal arises out of the award of the trial court to appellant Russell of a total of $237.60 representing the reasonable market value of the surface rights owned by Russell in the 23.76 acres taken by The Texas Company in its mining operations.

Appellant Russell claims that he is entitled to the reasonable value of the use of that 23.76 acres to The Texas Company for mining purposes, or a sum which he claims to be between $10,000 and $20,000. The Texas Company asserts that Russell never owned the surface for mining purposes, that he owned the right to use the surface for all purposes other than mining, that the highest value of the surface rights owned by Russell, is under the evidence the value for grazing purposes; and that

value under the conflicting evidence is the $10 per acre awarded by the court.

b. Second Issue:

The second issue arises out of the scoria or rock used by The Texas Company in construction of roads used both for mining operations on Section 23, and on adjacent sections; the use of water from the reservoir in drilling operations on Section 23 and also in drilling operations on adjacent sections; and the use of roads for mining operations on Section 23, and as an access to adjacent lands. The court found that all of the rock used by The Texas Company in the construction of roads was taken from the 23.76 acres for which it owed the market value to appellant Russell, and for which the court awarded judgment for the market value to appellant Russell, and the trial court refused to make any additional award to the appellant Russell for such rock. *(Tr. p. 117, Finding XVI).*

The court also found there was no competent evidence concerning the reasonable market value of the water used, and refused to make an award for such water, and found there was no competent evidence concerning the reasonable value of the use of roads, and refused to make an award for such purposes.

Accordingly, appellant Russell contends in the second place that he was entitled to an additional award for the rock used, the water used, and the use of the roads.

The Texas Company contends, on the other hand, that the trial court was correct in its findings of fact and holding in that respect, and contends further that since it was not a trespasser upon the land, it had a right to appropriate the water to its own use, and was in fact the owner of all water so used.

c. Third Issue :

The third basic issue arises out of an alleged contract which the court found between The Texas Company and appellant Russell arising out of an alleged revocable license in the use of Section 23 as an access to adjacent lands. *(Tr. pp. 115-116, Findings XII, XIII, XIV; Tr. p. 119; Conclusion of Law V.)*

The Texas Company used no rock on adjacent lands subsequent to October 28, 1952, the date of the alleged contract offer; used water on adjacent lands, title to which is claimed by The Texas Company as an appropriator, until November 12, 1952; and used the small fraction of 1.86 acres of road as an access to adjacent land until on November 22, 1952, when it completed construction of access roads around the section, whereupon it immediately ceased use of all roads on Section 23 as an access to adjacent lands.

Appellant Russell claims damages at $2.00 per day for the 55 days prior to the date of October 28, 1952, or a total of $110.00, for the use of all roads on the section. As indicated, the court felt there was no sufficient competent evidence for such valuation, and refused to award that sum. For the 24 days' use after October 28, 1952, the court did award a total of $3600.00, or at the rate of $150.00 per day, under an alleged contract which the court found between appellant and The Texas Company. The Texas Company has cross-appealed from that portion of the judgment in which the court finds a contract.

In the first place, the evidence is undisputed that appellant Russell has at all times leased the surface of this land to Bert Ekland for grazing purposes, that Ekland was using the land for such purposes, and it is difficult to see how the appellant Russell could impose a contract on The Texas Company under those circumstances.

In the second place, appellant Russell contends that when he specified that silence and the continued act of user would be deemed by him an acceptance of the terms of the contract, such made a contract. The Texas Company respectfully submits that before performance of the act called for can be deemed a contract, there must be an additional element of proof—that is, that the performance shall be with the intent thereby to consent to, or accept, the terms of the contract. In this case there was no evidence whatsoever that continued use by The Texas Company until it had built a road around the section indicated any intent upon the part of The Texas Company to consent to, or accept the unconscionable terms of the demand, that is, to pay $150.00 per day for the use which the appellant himself claims the reasonable value to be $2.00 per day. There were no prior business dealings between the parties to establish a course of conduct. All there is in the evidence is a notice from appellant to stop the use on penalty of being assessed $150.00 per day, the act of building another road around the section, and the ceasing of the wrongful use when that other road was completed. We respectfully submit that such facts do not make a contract. Courts will not enforce such an unconscionable bargain, particularly where it is attempted in a unilateral contract.

SPECIFICATIONS OF ERROR

1. The court erred in arriving at its Finding of Fact No. XIV, as follows:

> "XIV. That from and after the 30th day of October, 1952, and up to and including November 22, 1952 the said defendant continued using the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands and thereby accepted plaintiff's offer of a revocable license at the rate of $150.00 per day; that said defendant used the roadways, water and rock upon

plaintiff's sadi lands in connection with its operations on adjacent lands under said revocable license for a period of 24 days." *(Tr. p. 116.)*

2. The Court erred in arriving at its Conclusion of Law No. V as follows:

"That the defendant The Texas Company has wrongfully used Section 23 as an access to adjacent lands and has wrongfully taken native rock and water from Section 23 for use on adjacent land; that the plaintiff offered said defendant The Texas Company irrevocable license to continue such wrongful use of Section 23 in connection with operations on adjacent lands at the rate of $150.00 a day, and that by continuing said wrongful use of said Section 23, after receipt of said offer, the defendant accepted said offer and a contract was created thereby between the defendant and the plaintiff under the terms of which the defendant The Texas Company owes the plaintiff the sum of $3600.00." *(Tr. 119).*

3. The Court erred in arriving at its Conclusion of Law No. VII as follows:

"That plaintiff is entitled to judgment in the total sum of $3837.60, together with his costs. *(Tr. 120).*

4. The Court erred as a matter of law in its final judgment and decree herein in which it ordered, adjudged and decreed that the defendant The Texas Company shall pay to the plaintiff "the additional sum of $3,600.00 under a contract between the plaintiff and the defendant, The Texas Company, for the use of the lands." *(Tr. 128).*

ARGUMENT

I. First Issue:

a. Compensation due Mr. Russell for the use by The Texas Company of 23.67 acres in Section 23, 17N-53E, in Dawson County, Montana, in connection with its operations for the development of oil and gas upon that section.

To begin with, it is admitted that Russell was the owner of Section 23 in the spring of 1952, under the deed to his predecessor-in-interest from the Northern Pacific Railway Company *(Tr. pp. 59-60)*, where the Northern Pacific Railway Company reserved:

> "excepting and reserving unto the vendor its successors and assigns forever all minerals of any nature whatsoever including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon;"

It is further admitted that The Texas Company entered upon this land March 14, 1952, under an oil and gas lease from the Northern Pacific Railway Company, and drilled one well for the production of oil or gas, and thereby became obligated to pay Mr. Russell the market value at the time such operaitons were commenced of such portion of the surface of that section as was used for such operations.

The evidence established, and the court found, that the amount of land used by The Texas Company in connection with its operations on section 23 was 23.76 acres, and that the market value of such land was $10.00 per acre. *(Finding of Fact No. 11, Tr. p. 114)*.

It is admitted that The Texas Company used 190 yards of scoria or rock from section 23 for use in building roads on that section in connection with its operations thereon *(Tr. p. 75)*.

The court found that all of the scora or rock used by The Texas Company from section 23 in connection with its operations thereon (as well as upon adjacent land) was taken from

the 23.76 acres of plaintiff's land, referred to in the court's Finding No. 11, "for which the plaintiff became compensated by the payment to him of the market value of said 23.76 acres at the time defendant commenced its operations on his said lands." *(Tr. p. 117).*

It is further admitted that on or about April 17, 1952, The Texas Company constructed a dam in a coulee located in the SW¼SW¼ Sec. 23, creating a reservoir into which surface water drained coming down hill from section 26 in the same township and range, and that The Texas Company used 34,000 barrels of water from that reservoir in connection with its operations on section 23 *(Tr. p. 74).*

(1) Value of the Land

Mr. Ekland testified that he owned sections 24 and 26 adjoining section 23, and four sections cornering with section 23; that he had leased section 23 from Mr. Russell since 1920; that said section 23 is rolling and cut up with two or three gullies going through it. The land is used solely for grazing. There is no water on the land, except that collected and impounded by The Texas Company in the reservoir built by it on the section, except when it rains and the holes on the land hold water *(Tr. p. 224).* He valued the lands for grazing purposes at $7.00 or $8.00 per acre *(Tr. p. 27).* Ekland paid Russell $100.00 per year rental for section 23 *(Tr. p. 65).*

Counsel, at page 48 of their brief, insist that the 23.76 acres of section 23 used by The Texas Company in its operations thereon was worth from $10,000 to $20,000, basing their contention upon the testimony of Keith C. Morton, who testified that he was engaged in the business of oil well drilling and operating *(Tr. pp. 202-203).*

This raises the question as to the basis of Russell's claim for

damages or compensation. Counsel insist that Russell's claim should be based upon the value of the use of the land to The Texas Company. We contend, on the contrary, that the only available use of the land which appellant Russell had for sale, was the use for grazing purposes.

We must keep in mind the nature of the title acquired by appellant Russell and what he had available for use and for sale as of March 14, 1952. In addition to the fee title to the minerals themselves, defendant Railway Company had expressly excepted and reserved:

> "The use of such surface as may be necessary for exploring for, and mining or otherwise extracting and carrying away the minerals."

In Montana, a grant is to be interpreted in favor of the grantee, except that a reservation in any grant is to be interpreted in favor of the grantor *(67-1518 R.C.M. 1947, originally enacted in 1895)*. Furthermore, the right or title reserved or excepted at all times remains in the grantor, and never passes to the grantee *(City of Missoula v. Mix, 123 Mont. 372, 214 P. (2d) 212)*.

Accordingly, the Railway Company and its assigns at all times excepted, reserved, and owned, the right to use the surface of Section 23 for mining purposes. That right, that use, that title never passed to the appellant Russell. He could not prevent the defendants from so using the land; he could not use it himself for such mining purposes; he could not sell such right or use to anyone else. Appellant Russell owned only the right to use the surface for purposes other than mining, and that right was subordinate to the right of entry by the mineral owner. The evidence is undisputed that he owned dry, rough, unirrigated, unwatered, open range which had been used only for grazing since at least 1920, and which was suitable only for grazing.

The value of the highest use owned by appellant Russell was the value for grazing purposes, which is the value that was awarded to him by the court.

We shall not refer to the cases cited in support of this position by counsel for Mr. Russell, as we do not think any of those cases are in point upon the question here presented.

As the court says in its memorandum *(Tr. pp. 123-124):*

> "The plaintiff takes the position that the market value to be paid is to be based upon the highest value of the land for any purpose, and argues that the highest use for which said section 23 was suitable was for an oil well site, and that he should be compensated accordingly. To dispose of this argument, it is only necessary to point out that plaintiff, under the terms of the mineral reservation in his title, never had the right either himself to use the surface as an oil well site, or to sell the surface for such use to others. He is entitled to be compensated only for the value of the highest and best use to which he himself could put the land. The evidence in this respect shows the highest and best use to which plaintiff could put the land was for grazing."

As was held by the Supreme Court of this state in the case of *State v. Hoblitt, et al, 87 Mont. 403, 288 Pac. 181:*

> "The owner has the right to obtain the market value of the land, based upon its availability for the most valuable purpose for which it can be used, whether so used or not, but to be available for a purpose means capable of being used for that purpose, and, as the market value at the date of the summons control, the land must be shown to have been marketable at that time for the purpose stated * * *, the showing must be that the use is one to which the land may reasonably be applied."

In the case of *U. S. v. Boston, etc. Canal Co., 271 Fed. 877,* the Circuit Court of Appeals, First Circuit, states:

> "We are of the opinion that, in ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only

party who can use the property for that purpose . . .

"The canal property, as a toll-producing instrumentality is or may be of value to any person or owner. But the government upon whom the duty of national defense devolves is the only party to whom it has special utility for military and naval purposes. The evidence in question under this assignment had no relation to the toll-producing qualities of the canal, and had nothing to do in the way of showing its utility or availability for military or naval purposes in the hands of any person other than the government. Its sole bearing was upon the special and peculiar utility of the property to the government as a taker for purposes of national defense. The evidence was incompetent."

In the case of *Continental Land Co. v. U. S., 9th Circuit, 88 (Fed. (2d) 104,* this court used the following language:

"The following from the Supreme Court in United States v. Chandler-Dunbar Water Power Co., supra, 229 U. S. 53, at page 76, 33 S. Ct. 667, 677, 57 L. Ed. 1063, is decisive: 'The government had dominion over the water power of the rapids and falls, and cannot be required to pay any hypothetical additional value to the riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact. The question is what has the owner lost, and not what has the taker gained.'

"It is axiomatic that if the riparian owner has no right to approach the river as against the right of navigation, he has no inherent right of value 'adaptable to special use' over and above the reasonable market value of the upland for any purpose to which it may reasonably be adapted now, or in a reasonable time in the future. This was fairly submitted to the jury. This issue is no newly created relation or right, but has existed long prior to the private ownership in the land. The rights were fixed and relations established by the adoption of the Constitution.

"The claim of appellants has no substance, it has no possessory status; it is based upon something which is not possessed, and not being possessed, it has to appellants no

value, and appellants lost nothing. The question is, what have appellants lost, not what appellee gained."

In the case of *Washington Water Power Co. v. U. S., 9th C. C., 135 F. 2d 541, cert. den., 64 S. Ct. 50, 320 U. S. 747,* the court used the following language:

> "In the ordinary case, the evidence offered by the company would be pertinent as to the question of 'reasonable probability' for the special use, and as to the value of the property for such use. However, this court has held that since a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States, such riparian owner may not recover for the alleged power-site value of the riparian lands."

Other cases to the same effect are:

U. S. v. Miller, 63 S. Ct. 276, 317 U. S. 369;

U. S. v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 S. Ct. 667;

Boston Chamber of Commerce v. City of Boston, (Mass.) 217 U. S. 189, 30 S. Ct. 459.

It is our belief and contention that inasmuch as Mr. Russell could not use the surface of section 23 for the purpose of exploration for minerals thereon ,and could not sell that right to any other person, the value of the surface of the section for such operations could not be the basis for compensating Mr. Russell for the use thereof for that purpose. The only available use to which Mr. Russell could put the surface of Section 23 was for grazing, and that is the basis upon which his compensation was based by the court, and must be based.

In any event, there is no competent evidence justifying the evaluation claimed by appellant. The sole and only evidence was the testimony of K. C. Morton which was allowed by the trial court subject to running objection *(Tr. 199-200, 202)*. In the first place, Morton attempted to place a value on the use to

to The Texas Company for mining purposes after mining developments had been fully completed, instead of the market value of that use owned by appellant Russell as of the date mining operations commenced on March 14, 1952. In the second place, all rules of evidence relative to the admissibility of the testimony of expert witnesses was violated. Morton had never seen the property upon which he placed his valuation, and thus had no personal knowledge of it, and his opinion was required to be elicited by a proper hypothetical question, or a showing of the facts upon which his expert opinion was based, none of which was attempted. The facts shown were required to relate to the time or date when the evaluation was being judged, or in this case to March 14, 1952, which was not attempted. His opinion was solicited upon generalized inquiry concerning other testimony heard by the witness, without any attempt to delineate what that testimony was, and was further attempted to be supported upon incompetent and irrelevant evidence *(Pl. Ex. 10)*. He was never asked to assume the truth of the facts upon which his opinion was requested, nor to delineate the facts upon which his opinion was based. The objection to his testimony in addition to other grounds included that there was no proper foundation; his testimony was not within the issues of the pleadings; it was incompetent, irrelevant and immaterial; and it had no bearing on the issue of the market value of this grazing land at the time operations were commenced *(Tr. 199-200; 202)*.

Volume 2, Wigmore on Evidence, Third Edition, Subdivision 4, Hypothetical Questions, Pp. 792, Sec. 672; Sections 674-677, Pp. 796-798; Section 681, Pp. 800-805;

Volume 2, Jones on Evidence, Fourth Edition, Pp. 701, Sec. 374; Pp. 703, Sec. 375;

Volume 2, Bancroft's Court Practice and Remedies, Pp. 1784, Sec. 1310.

Montana has accepted or recognized the same basic rules, *Irion v. Hyde, 110 Mont. 576 at 578, 105 P. (2d) 666;* and see *U. S. v. Sampson, 9th C. C., 79 F. (2d) 131; U. S. v. Noble, 9th C. C., 79 F. (2d) 342.*

Accordingly, the court awarded to Mr. Russell under the conflicting evidence the market value of the only right which appellant Russell owned and had for sale, the use for purposes other than mining. In any event, there was no competent evidence on the evaluation now claimed by appellant.

II. Second Issue:

a. *Right to the Use of the Water in Drilling Operations on Section 23.*

The appellant Russell claims that he is entitled to the sum of $5100.00 for the use of 34,000 barrels of water used in the operations of The Texas Company on Section 23, which was taken from a reservoir installed on that section by The Texas Company.

In the first place, there is no competent evidence in the record as to the value of that water on section 23. All of the witnesses who testified on this point for Mr. Russell based their estimate as to the value of the water upon the cost of transporting the same for a distance of from two to four miles *(Tr. pp. 186, 200, 20, 205)*. The court, in its Finding No. 16, concluded:

> "There is not sufficient evidence in the record from which it could determine the reasonable market value of said water." *(Tr. p. 117).*

Further, as anticipated by counsel for Russell, at pages 48 and 49 of their brief herein, we do contend that The Texas

Company and not Mr. Russell was the owner of the water in question.

The facts show that the land in question is rough, and cut up with draws or gullies running through the same. As Mr. Ekland testifies, the section is rolling and cut up with two or three gullies going through it, and part of the north part of it is kind of bad land. The rest of it is fairly good grazing land. Prior to the building of the dam by The Texas Company, the only water on the land is "when it rains and then holes fill up with water." There is a little seepage under a coal vein, but it is not very much." *(Tr. p. 224).*

About April 17, 1952, The Texas Company constructed a dam creating a reservoir on section 23, into which the surface waters coming down from section 26 drained. The Texas Company used about 34,000 barrels of that water in its drilling operations on section 23 between April 17, 1952, and August 29, 1952 *(Tr. p. 74).*

Section 89-801 R.C.M. 1947, provides:

> "The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."

See also: *Doney v. Beatty, 1241 Mont. 41, 220 P. (2d) 77.*

The Supreme Court of the State of Montana has held that any person who, in the absence of any conflicting and adverse claim, has actually diverted water and put it to a beneficial use, acquires title thereto.

Murray v. Tingley, 20 Mont. 260, 50 Pac. 722;
Bailey v. Tintinger, 45 Mont. 154, 122 Pac. 575.

As a complete answer to any such contention by The Texas Company, counsel at page 49 of their brief herein quote from

the case of *Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081,* which holds that one person could not go upon the land of another for the purpose of making an appropriation of water, except by condemnation proceedings.

However, the rule laid down in that case was subsequently modified by the Supreme Court of this state in the case of *Connolly v. Harrel, 102 Mont. 295, 57 P. (2d) 781,* where the court says:

> "In the case of Scott v. Jardine Gold Mining & Milling Co., 79 Mont. 485, 257 P. 406, 410, it was said: 'It is settled law that one may not acquire a water right on the land of another without acquiring an easement in the land.' The following cases are cited as supporting the statement: Prentice v. McKay, 38 Mont. 114, 98 P. 1081; Smith v. Denniff, 24 Mont. 20, 60 P. 398, 50 L.R.A. 737, 741, 81 Am. St. Rep. 408, and Warren v. Senecal, 71 Mont. 210, 228 P. 71."
>
> * * * * *
>
> "We conclude that the attempted appropriations of the defendants made under a license from Jensen to use his ditch and point of diversion were valid appropriations. The general expressions found in the previous decisions of this court mentioned, supra, are hereby limited to cases of trespass."

Therefore, under the present rule of our court, anyone may make an appropriation in a reservoir of diffused surface water upon the lands of another unless he is a trespasser.

Here, it is apparent that The Texas Company was not a trespasser on section 23, but entered the section and had possession of the surface thereof by virtue of the reservation of the Northern Pacific Railway Company in the deed by it to Mr. Russell's predecessor-in-interest, and likewise under the oil and gas lease from the Northern Pacific Railway Company to it. Therefore it is our contention that The Texas Company law-

fully appropriated and owned the water impounded by it in the reservoir constructed by it in section 23.

b. *Scoria or Rock.*

As to the scoria and rock taken from section 23 and used in the building of roads constructed thereon, which roads were used by The Texas Company in its operations on the same section, the evidence established that The Texas Company used 190 cubic yards of such materials in the construction of roads on section 23 in connection with its operations thereon.

The witness Lillis, without being qualified, testified that in his judgment the value of the materials (rock or scoria) in that particular instance was largely due to its availability, accessibility and closeness to its use, and 50¢ a cubic yard would probably cover that as the value of the material in the quarry from which it was taken *(Tr. p. 184)*.

Here again the witness bases his judgment as to the market value of such materials on what he considers the value thereof to The Texas Company, —not on the reasonable market value of the material in place on the premises.

In its Findings of Fact and Conclusions of Law herein, the lower court does not determine the value of the scoria or rock taken from said section 23 by The Texas Company, holding that this rock was taken from the 23.67 acres, for the taking of which plaintiff (Russell) is being compensated, and no additional damage by reason of the use of the rock is shown *(Tr. p. 124)*.

It is our opinion that the reasonable market value of such scoria or rock is established by the witness Tommie Bliss when he testified as follows:

> "Q. Did your company have occasion to buy any of the local scoria, or country rock, for use in any roads? A. Yes.

"Q. About when was that, if you remember?

"A. When this by-pass road was built around 23, section 23, we dealt with Mr. A. R. Newton for scoria to be taken off of his section 22, and we dealt with him at five cents per yard.

"Q. Is that what you paid Mr. Newotn for the rock in place? A. That's right."
(Tr. pp. 220-221.)

Therefore we contend that the allowance of $237.60 to Mr. Russell by the court in its Findings and Judgment, as the amount Mr. Russell is entitled to for the use of the surface, scoria and rock by The Texas Company in connection with its operations upon section 23, is proper, and the only amount that Mr. Russell could be entitled to under any theory of the case.

III. Third Issue:

Cross Appeal by The Texas Company from the Decree in this case awarding Russell, the Cross-Appellee, the sum of $3600.00.

The decree herein awards Russell a judgment against The Texas Company for $3600.00 "under a contract between plaintiff and the defendant The Texas Company." *(Tr. p. 128).*

The facts in this case, as to which there is no dispute, are that in the spring of 1952 The Texas Company, proceeding under the terms of an oil and gas lease covering Section 23, in Twp. 17 N., Rge. 53 E., entered into the possession of that section for the purpose of drilling an oil and gas well thereon and in connection with such operation used 23.67 acres of the surface of the said section 23, which surface belonged to Russell, the cross-appellee herein.

On or about April 17, 1952, The Texas Company constructed a dam creating a reservoir on said land, in which it gathered and impounded surface water coming down the hill from section

26 in the same township and range, and used about 15,000 barrels of that water for drilling operations in section 22 between September 14, 1952, and November 12, 1952. No water was ever taken from section 23 for use on either section 23 or section 22 or any other land *(Tr. p. 74)*.

It is further admitted that cross-appellee, The Texas Company, used the roads constructed by it on section 23 for access to sections 22 and 26 until November 22, 1952 *(Tr. p. 94)*.

The judgment for $3600.00 against The Texas Company is based upon the alleged contract between Russell and The Texas Company is based upon the alleged contract between Russell and The Texas Company, arising by reason of the letter from Vaughan, Brandlin & Wehrle to The Texas Company dated October 28, 1952. Therein it was stated:

> "This conduct by you over the period of the past sixty days constitutes a wilful trespass and conversion for which there is no authority in law or fact. Compensation for such trespass at the rate of $150.00 per day is hereby demanded by return remittance.
>
> "Demand is made that you forthwith cease and terminate your said use of the roadways, water and materials.
>
> "Mr. Theodore B. Russell is willing to permit you a revocable license to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of $150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadway, water and/or materials will constitute your acceptance of this revocable permit. Your remittance should be made to Mr. Theodore B. Russell, 2422 Forest Drive, Des Moines 12, Iowa." *(Tr. p. 86)*.

This letter was not answered by The Texas Company until that company wrote to Mr. Russell's attorneys under date of December 16, 1952, wherein Mr. Will, who signed the letter

on behalf of The Texas Company, refused to consider the offer made by Mr. Russell *(Tr. p. 82)*.

As pointed out above, it is the contention of counsel for Mr. Russell that the continued use of the surface of section 23 by The Texas Company in connection with its operations on the adjacent sections 22 and 26 constituted an acceptance of the offer made on behalf of Mr. Russell by his attorneys, and resulted in a contract between the parties whereby The Texas Company agreed to pay Mr. Russell at the rate of $150.00 per day for each day thereafter that The Texas Company so used the surface of section 23 in connection with its operations on adjacent sections.

The letter from Mr. Russell's attorneys above referred to was dated October 28, 1952, and assuming that it was mailed on that day, should have been received by The Texas Company not earlier than October 30, 1952. The court found: "That from and after the 30th day of October, 1952, and up to and including November 22, 1952, the said defendant continued using the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands, and thereby accepted plaintiff's offer of a revocable license at the rate of $150.00 per day; that said defendant used the roadways, water and rock upon plaintiff's said lands in connection with its operations on adjacent lands under said revocable license for a period of 24 days." *(Finding of Fact No. XIV, Tr. p. 116.)*

That Finding is incorrect in some particulars. The only evidence in the record as to the extent of the use of section 23 by The Texas Company of water and scoria from said section 23 is found in the admission of The Texas Company in answer to Russell's interrogatory at page 74 of the Transcript where it is stated that no water was taken from the dam in Section

23 for the use on adjoining lands in Sections 22 or 26 after November 12, 1952, and no scoria or rock was taken from Section 23 for use on other lands after October 31, 1952.

Likewise the admission of The Texas Company, in reply to interrogatory of Russell conceded that The Texas Company ceased its use of the roadways over and across section 23 as a means of access to lands in sections 22 and 26 on November 22, 1952. *(Tr. p. 94)*.

Mr. Russell's offer to The Texas Company, contained in the letter from his attorneys above referred to, was that he was willing "to permit you (The Texas Company) a revocable license to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of $150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadways, water and/or materials will constitute your acceptance of this revocable permit."

It is our contention that the use of the roadways over Section 23 and the water produced and impounded on Section 23 in the operations of The Texas Company on adjacent sections after October 30, 1952, constituted no consideration whatever for the alleged promise by The Texas Company to pay Russell $150.00 per day.

In the first place, Russell was granted judgment against the Company for the *full market value* of 23.67 acres of Section 23 used by The Texas Company in its operations on Section 23 and that acreage belonged to The Texas Company so long as it was operating thereon and the roads being constructed. The use thereof by The Texas Company constituted no additional burden on Russell.

Insofar as the surface waters impounded on Section 23 were

concerned, as we pointed out above, that water belonged to The Texas Company and could be used by that Company at any place or location that it saw fit without creating an obligation of any kind to Mr. Russell therefor.

As pointed out above, no scoria or rock taken from Section 23 was used by The Texas Company on adjacent lands after the receipt of the letter of October 28, 1952. Therefore, there was no consideration of any kind for the alleged promise by The Texas Company to pay Mr. Russell $150.00 per day for such use.

Further, it appears from the testimony of Mr. Ekland that at all of the times mentioned he occupied Section 23 under a lease from Mr. Russell covering all of Section 23 *(Tr. p. 223)*. Therefore, if anyone was entitled to collect any rental or compensation for use of the 23.67 acres of the surface of said section, it would be the tenant Ekland, not Mr. Russell.

In any event, whether The Texas Company was entitled to the use of the roads in Section 23 and water from the reservoir on Section 23 in connection with its operations on adjacent lands, Mr. Russell was not entitled to any compensation therefor.

In addition to the fact that appellant Russell had already leased the surface to Bert Ekland for grazing purposes, and could not therefore impose a contract upon The Texas Company, and in addition to the fact that he is attempting to impose an unconscionable contract of $3,600 for 24 days' use of 1.86 acres of road, for which his own evidence indicates the reasonable value would be a total of $48, we submit that there is no evidence of any intention upon the part of The Texas Company by continuing to use the 1.86 acres of road to thereby enter the unconscionable contract which appellant Russell now attempts to impose.

Our only user wrongfully after the letter of October 28, 1952,

was mailed, was the 1.86 acres of roads. For 55 days of use of all of the roads before October 28, the appellant claims:

> "The only testimony before the court as to the value of the use of the roads for access to defendant The Texas Company's operations on lands other than the lands of the plaintiff, is the testimony of Mr. Lillis, who testified that the use of these roads should be reckoned at at least $2.00 per day. (R. 182) This testimony was not disputed or contradicted. The Texas Company, having commenced its use of these roads for operations on lands other than those of the plaintiff on September 3, 1952, plaintiff's recovery for the use of the roads up to the time of the letter of October 28, should have been $110." *(Appellant's brief, p. 41).*

And yet, for the 24 days thereafter between October 30 and November 22, for which the value of the use according to appellant's own evidence would be a total of $48, appellant was awarded and claims a total of $3600.

Summarizing the facts, the defendants had a legal right to enter and use the surface of Section 23 for operations on Section 23. Appellant Russell had already leased the surface of these lands to Bert Ekland, and had no right to impose a contract for such use upon the defendants. There were no prior business dealings between the parties which would indicate that continued use of the roads until a new road had been built would constitute an acceptance or consent. When notified to stop using the roads, The Texas Company constructed a new roadway around Section 23, and then ceased use of such road. By letter dated December 16, 1952, The Texas Company expressly rejected the unconscionable offer. The plaintiff in his own pleading by asking for an injunction indicates there was no such contract. It is unreasonable to assume that The Texas Company intended to consent to pay a total of $3600, when

the reasonable value of the use according to appellant's own testimony was a total of $48.

Montana Statutes Pertinent.

Montana Statutes Pertinent. Appellant relies solely on the provisions of Section 13-320. That section, however, must be read in conjunction with the other sections. Other sections indicate that before performance of the conditions of a proposal can be considered an acceptance, there is an additional requirement, and that is that there was thereby an intention to accept the proposal and make the contract. Such is suggested by the provisions of *Section 13-317, R.C.M. 1947,* in which our code specifies that consent can be communicated with effect only by some act of the party contracting "by which he intends to communicate it, or which necessarily tends to such communication." Such is the rule recognized by the *Restatement of Law Contracts,* by the opinion of the faculty of the Montana State University Law School, which wrote the *"Montana Annotations to the Restatement of the Law of Contracts,"* by *Williston,* and by general authorities.

Montana statutes particularly pertinent are:

"13-102. Essential elements of contract. It is essential to the existence of a contract that there should be:

"1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration."

"13-301. Essentials of consent. The consent of the parties to a contract must be:

"1. Free;
2. Mutual; and,
3. Communicated by each to the other."

"13-317. Communication of consent. Consent can be communicated with effect only by some act or omission of the

party contracting, by which he contends to communicate it, or which necessarily tends to such communication.

"*13-318.* Mode of communicating acceptance of proposal. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted."

"*13-319.* When communication deemed complete. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section."

"*13-320.* Acceptance by performance of conditions. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal."

Section 55 of the Restatement of the Law of Contracts provides:

"ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT; NECESSITY OF INTENT TO ACCEPT.

"If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given *with the intent of accepting the offer.*" (Italics supplied.)

With respect to that section, the *Montana Annotation* states:

"Sec. 55. Acceptance of offer for unilateral contract; necessity of intent to accept.

"No case found. The rule *accords* with the language of cases involving bilateral contract which say that there must be mutual assent to form a contract, or that the parties must give their free and voluntary assent to the terms. (Citing cases.) But in accord with Sections 20 and 23 of the Restatement, J. Neils Lumber Co. v. Farmers' Lumber Co., supra, indicates that, despite the statement made to the contrary, in a bilateral contract it is not necessary that the party intend to accept an offer provided he has manifested an intention to accept. Section 55 in reality therefore lays down an additional requirement of accepting the

offer.' Since an act is equivocal it seems reasonable to require proof of intent."

Section 72, Volume One, Restatement of Contracts, provides:

"Sec. 72. ACCEPTANCE BY SILENCE OR EXERCISE OF DOMINION.

"(1) Where an offeree fails to reply to an offer, his silence and inaction operates as an acceptance in the following cases and in no others:

(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, *and the offeree in remaining silent and inactive intends to accept the offer.*

(c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand." *(Sec. 72, Pp. 77)*

The *Montana Annotation* states:

"Clause (b). No authority found but reasonable. See See Williston, Contracts, Sec. 91A. If the offeree may remain silent with no intention to accept there will be no contract.

"Clause (c). No case found. See Williston, Contracts, Sec. 91."

Williston on Contracts, Revised Edition, is very helpful. He states:

a. "Sec. 64. Necessity of acceptance.

"Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain. * * *"

(Vol. 1, Pp. 189)

b. "Sec. 67. An intention not to accept may prevent the formation of a contract where words or acts are ambiguous.

"Though if an offeree of a bilateral contract should say, 'I accept the offer,' he would not thereafter be allowed to say that his words were not an acceptance because he did not really intend to accept the offer, yet where an act is requested by the offeror and performed by the offeree, *it may be shown that the performance of the act did not indicate assent to the offer.* Even though the offeree knew of the offer, he may if he choses, do the act requested and still refuse to accept the offer. Thus, in case of an offer of reward for the finding of a watch, the finder may state that though he returns the watch, he does not accept the offer. And even though he makes no such express disclaimer, it is still true that the finding and return of the watch is an ambiguous act which may mean assent to the offer, or which may mean merely that the finder is sufficiently honest to return property which does not belong to him, without desiring a reward. The act may mean either of these things. If in a particular case it indicates assent to the offer, there is a contract; *but it may be evident, when all the facts are known, that the act did not mean assent to the offer. In that event there is no contract."*

(Sec. 67, Pp. 191, Vol. One.)

c. "Sec. 91. When silence and inaction may amount to assent.

"Generally speaking an offeree need make no reply to offers, and his silence and inaction cannot be construed as an assent to the offer; but the relations between the parties or other circumstances may have been such as to have justified the offeror in expecting a reply, and, therefore, in assuming that silence indicates assent to his proposal. Such cases may be thus classified:

* * * *

"(2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction ,and the offeree in remaining silent and inactive intends to accept the offer.

"(3) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the

offeree as a manifestation of assent, and the offeror does so understand.

* * * *"

(Sec. 91, Pp. 279, Vol. One.)

"Sec. 91B. Silence or inaction with intent to accept.

"Even where the offeror is not justified in understanding the offeree's silence as an acceptance, a line of argument which has not been formally stated in the cases may be advanced to indicate that mere silence, though unaccompanied by any act, may amount to an caceptance if the offeror requested that mode of indicating assent, *and assent was intended by the offeree.* When an offer is made to one who remains silent, the silence may be due to a variety of causes. It is clear that, whatever may have been the offeree's state of mind, no contract can be made unless the offer stated that the offeror would assume assent in case the offeree made no reply. *But if the offer does so state, the offeree's silence is ambiguous, and may doubtless be shown not to to have meant assent. Certainly the offeree may with immunity keep silent if he chooses without becoming charged with a contract.* * * *

"Such silence will not establish a contract unless the silent offeree means his silence to indicate assent. * * *"

"Sec. 91C. Authorization by the offeree to treat his silence as assent.

"The converse of the situation referred to in the preceding section is also possible. The offeree may authorize the offeror to regard silence as an acceptance of his offer. Such authorization is not likely to be given in express terms, but the conduct of the offeree in previous dealings or in earlier stages of the existing negotiation may have justified the offeror in understanding silence as assent. If he does so understand there is a contract. It is for this reason that the silent retention of a statement of account between the parties may often indicate assent to the correctness of the statement and furnish the basis for an account stated.

"Evidence of usage in a particular trade has been held

admissible with other circumstances to prove assent a justifiable inference from silence.

"A further extension of this doctrine is developing in the cases, —that, where an offeree solicits the offer, this, in the light of the relations of the parties or other surrounding circumstances, may justify the offeror as a reasonable man in interpreting the offeree's silence after receiving the offer as acceptance."

(Sec. 91B, Pp. 284,
Sec. 91C, Pp. 286, Vol. One.)

The situation we have before us is one in which The Texas Company rightfully constructed and used roads upon the property of appellant Russell. Insofar as a very small portion of these roads (1.86 acres) is concerned, it was used as a connecting road for oil and gas developments in other lands. Russell, who claims the reasonable rental value is $2.00 per day, thereupon attempted to force this use into the status of an express contract, on his terms, by declaring that rental charges of $150 per day would be made of The Texas Company for use of the roads, with continued use of the road being interpreted by him as assent, or acceptance of his "offer" by The Texas Company; and with no showing whatever of any intent on the part of The Texas Company to thereby accept his terms.

It is readily acknowledged that Russell may bring an action ex contracto for the reasonable value of the use of his property. But he may not convert the use into an express contract calling for a daily rate of payment of his own choosing, which sum might as well have been $15,000 a day as $150 a day, if he is right, and which realization must necessarily lay bare the fundamental vice in his contentions. Indeed, if Russell is right, any householder might affix an enormous contractual obligation upon a continued trespass crossing of his yard after a

notice comparable to that made by Russell, and one can think of other outrageous examples almost without end.

The situation created by Russell is deceptive. It looks like a normal offer and acceptance in a unilateral form of contract. The defect is found in the unreasonableness of assuming intent to accept.

The meaning of this rule is clearly demonstrated by two California cases. (Note that the Montana statutes quoted above were taken from California. These two cases may well be the only American decisions dealing with this type of claim. If so, and research makes it appear likely that it is so, it would appear that few litigants have been encouraged to press the legal position here assumed by Russell, for most attorneys have at one time or another seen the groundwork of this type of claim laid.)

In the case of *Wright v. Sonoma County (Cal.), 105 Pac. 409,* the Supreme Court of California was confronted with a situation where the defendant continued to use water from a certain well even after the California Supreme Court had determined that the water belonged to plaintiff and defendant had no rights therein. This continued use of water was in the face of plaintiff's declaration that $50.00 per day for the use of such water would be charged in the event defendant disregarded a notice to cease using the water. Plaintiff rested his whole case upon an express contract thereby created to pay $50.00 per day. The Supreme Court of California said, in answer to plaintiff's contentions:

> "The provisions therein to the effect that the owners demand $50.00 for each and every day on which the notice to refrain from taking water is violated cannot be construed as a proposition to sell water at that rate. It amounted to no more than a notice of the amount of damage that the owners would claim for the taking of the water without their consent. And the taking of the water by defend-

> ant under the circumstances shown, even after the decision of the Supreme Court in regard to the relative rights of the parties became known to it, cannot be held to show any acceptance by it of the proposition to sell the water for a specified price. The cases cited by learned counsel for plaintiff in this regard are all cases in which the conduct of the party was such as to afford reasonable evidence of his consent to a proposition theretofore made. So far as any right to compensation for water actually taken is concerned, which is the only right asserted in this action, as was said by the learned trial judge, 'the only claim open to plaintiff, was for the reasonable value of the water.' No such claim has been asserted; the plaintiff, both in his complaint and throughout the proceeding, relying exclusively on his claim that there was an express contract for $50.00 for each day on which water was used from said well."

In the case of *Sherman v. Associated Tel. Co., Ltd. (Cal. App.), 224 P. (2d) 847,* the Court had before it a situation where defendant had erected wires which extended beyond the boundary of its easement along the boundary of plaintiff's property and overhung plaintiff's property, thereby constituting a trespass. Among other things plaintiff notified defendant to remove the wires overhanging the property within three days and unless the wires were removed plaintiff would charge the dfendant $25.00 pr day for each day the wires rmained on plaintiff's property. The court pointed out that the most that plaintiff was entitled to was the reasonable value of the use and occupation of the property and rejected his attempt to compel defendant into an express contract of this nature. The case of *Wright v. Sonoma County* was cited as precedent for the holding.

See also: *17 C.J.S. Contracts, Sec. 41e;*
12 Am. Jur. Contracts, Sec. 43.

We respectfully submit the undisputed evidence affirmatively

liscloses that appellant Russell had already leased the surface o Bert Ekland, and there is no showing that he had any power r authority to contract to let The Texas Company use it. Appellant Russell claims he is entitled to the reasonable value of he use for the 55 days between September 3 and October 28 t $2 per day, or $110.00, but at the rate of $150.00 per day or the 24 days thereafter until November 22, or $3600.00. There is no proof whatsoever of any intent on the part of The Texas Company to accept these unconscionable terms by the ontinued user until the new road could be completed. There is o evidence of any prior dealings between the parties that would ustify such inference. There was no contract. Appellant Russell an recover only what he has proved by competent evidence, if ny, to be the reasonable value of the wrongful use.

Finally, the following rule is expressed in the work on Contracts, *Corpus Juris Secundum, Volume 17 at page 475* thereof s follows:

> "Where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence. So, while it is ordinarily stated to be the rule at law that the adequacy of consideration is not material, as shown supra Sec. 217, a court of law, where the contract is unreasonable and unconscionable, may give a party who sues for the breach, not what the other party romised to pay, but only what plaintiff is honestly and equitably entitled to."

his rule is supported by the following cases:

Hume v. U. S., 132 U. S. 406, 10 S. Ct. 134;

Mandel v. Liebman, N. Y., 100 N. E. (2d) 149;

Herbert v. Lankershim, Cal., 71 P. (2d) 221;

Sova v. First National Bank of Ferndale, Wash., 138 P. (2d) 181;

Hanks v. McNeil Coal Corporation, Colo., 16[illegible] P. (2d) 256;

Stiefler v. McCullough, Ind., 174 N. E. 823;

Woods v. Griffin, Ark., 163 S. W. (2d) 322.

Even if there was any consideration whatever for the agreement alleged to have been created by the letter dated October 28, 1952, from Mr. Russell's attorneys to The Texas Company, followed by the continued use of the roads and water produced on Section 23 in connection with the operation of The Texas Company on adjacent lands for a short period of time, any benefit received by The Texas Company and any detriment suffered by Mr. Russell is so inconsequential and insignificant that no court should allow Mr. Russell judgment for $3600.00, but only what Russell is honestly and equitably entitled to.

There is no competent evidence of damages for wrongful use. The measure of damages in Montana for a wrongful use of real property is the value of the use to the landowner, the reasonable rental value.

Section 17-201, R.C.M. 1947;

Section 17-402, R.C.M. 1947;

Section 17-607, R.C.M. 1947;

Pritchard Petroleum Co. v. Farmers Coop., 121 Mont. 1, 190 P. (2d) 55;

Bordieu v. Seaboard Oil Corp., Calif., 146 P. (2d) (2d) 973, 100 P. (2d) 528;

Holbrook v. Continental Oil Co., Wyo., 278 P. (2d) 798.

CONCLUSION

March 14, 1952, was the date of the commencement of mining operations by The Texas Company. It used in such operations a total of 23.76 acres. The Texas Company owed Russell

the market value of the surface rights owned by Russell and taken for such mining use as of March 14, 1952. The only surface right owned by Russell was the right to use the surface for purposes other than mining, and that right was subordinate to the right of entry of the owner of the mineral fee. The surface was dry, unirrigated, open range, grazing land. Under conflicting evidence, the court found the market value of March 14, 1952, was $10 per acre. The Texas Company owed Russell for the 23.76 acres taken $237.60, the amount awarded by the court. In any event, there was no competent evidence of the value for mining purposes.

Part of the 23.76 acres for which the market value was awarded included roads. There could be no additional award for the rental value of the roads. In any event, there was no competent, substantial evidence of such rental value.

From the 23.76 acres for which the market value was awarded, we took scoria or rock for use in building roads. There could be no additional award for the value of this rock. In any event, there was no competent evidence of the value of the rock.

The Texas Company rightfully entered upon the land for mining purposes and built a dam or reservoir. Not being a trespasser, it had a right to appropriate and use the diffused surface waters trapped in the reservoir. It owned such water, and appellant was not entitled to any award for the water so taken. In any event, there was no competent evidence of the value of such water.

Finally, appellant Russell had already leased the surface to Albert Ekland. He could not impose upon The Texas Company the unconscionable contract proposed. The conduct of The Texas Company clearly reflects that it never intended to accept the

unconscionable terms proposed by appellant Russell. There wa no contract.

The only sum to which appellant Russell is entitled is th sum of $237.60.

Respectfully submitted,
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